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K-TEC, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

K-TEC, Inc., a Utah corporation,

Plaintiff,

vs.

Vita-Mix Corp., an Ohio corporation,

Defendant.

**JOINT CLAIM CONSTRUCTION
AND PREHEARING STATEMENT
(PATENT LOCAL RULE 4-3)**

Civil Case No. 2:06-cv-00108

Judge Tena Campbell

Pursuant to Patent Local Rule 4-3, Plaintiff K-TEC, Inc. ("K-TEC") and Defendant Vita-Mix Corporation (Vita-Mix) hereby submit the following Joint Claim Construction and Prehearing Statement pursuant to Local Patent Rule 4-3.

I. UNDISPUTED CLAIM TERMS

The parties agree that all claim terms and phrases not expressly identified herein do not require further construction or interpretation from the Court at this time. However, the parties

reserve the right to seek further claim construction from the Court should the need arise from subsequent proceedings or discovery.

II. CLAIM TERMS/PHRASES THE PARTIES AGREE SHOULD BE CONSTRUED BY THE COURT

A. TRUNCATED WALL

Plaintiff's Proposed Construction: A wall (planar or non-planar) that truncates, in essence, the typical corner that would otherwise be formed between two side walls.

*Citations:*¹ '117 patent at col. 6, ln. 52 – col. 7, ln. 12; Figures 10-11; claims 1-36.

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

Defendant's Proposed Construction: A distinct planar wall that is not a curved area or surface that forms corners with the adjacent two side walls and truncates the corner that would otherwise be formed between the two adjacent side walls.

Citations: '117 patent at col. 6, ll. 56-65; Figs. 10-11; claims 1-36. '842 patent at col. 6, ll. 62-67; Figs. 10-11; claims 1-15.

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

American Heritage Dictionary of the English Language (***Truncated:*** "Having the apex cut off and replaced by a plane, especially one parallel to the base. Used of a cone or pyramid."); *Encarta World English Dictionary*, N. Am. Ed. (***Truncated:*** "with end replaced by plane: describes a geometric figure that has the apex or an end removed and replaced with a plane section, often parallel to the base."); *Merriam-Webster's Online Dictionary*, 11th Edition (***Truncated:*** "Having the apex replaced by a plane section and especially by one parallel to the base <a truncated cone>."); *Webster's New World College Dictionary*, 4th Ed. (***Truncated:***

¹ Due to the volume of potentially-relevant prosecution history, including reexamination history and related applications, in this case, the parties have agreed to omit citations to supporting prosecution history in this Joint Statement. The parties will cite any portions of the prosecution history they believe support their proposed constructions in their respective claim construction briefs.

“Cut off or replaced by a plane face: said of the angles or edges of a crystal or solid figure; having the vertex cut off by a plane that is not parallel to the base: said of a cone or pyramid.”); *Webster’s Third New International Dictionary* (**Truncated**: “To replace (as an edge or corner of a crystal) by a plane and esp. by a plane that is equally inclined to the adjoining faces.”); *American Heritage Dictionary*, 2d College Ed. (**Truncated**: “To replace (the edge of a crystal) with a plane face.”); *McGraw Hill Dictionary of Scientific and Technical Terms*, 6th Ed. (**Truncated**: “To construct from a geometric solid another solid consisting of those portions of the original solid that lie between to planes.”); *Cambridge Dictionary of Science and Technology* (**Truncated**: “Square-ended base or apex of a structure, as if cut off.”).

III. CLAIM TERMS/PHRASES FOR WHICH THE NEED FOR CONSTRUCTION IS IN DISPUTE

K-TEC believes that the Court need only construe the “truncated wall” limitation, as set forth above, in order to resolve the substantive issues in this case and objects to imposing unnecessary definitional language on any other claim terms or phrases. Vita-Mix believes that the Court must construe several additional terms in order to resolve the substantive issues in this case and objects to K-TEC’s contention construction of those terms will impose unnecessary definitional language, especially since K-TEC disputes the definitions Vita-Mix proposes. Vita-Mix accordingly identifies the following additional terms for construction by the Court:

A. CORNER/CORNERS/INTERSECTING CORNERS

Plaintiff’s Proposed Construction: the place where converging walls meet.

Citations: ‘117 patent at col. 6, ln. 40-41, 54-67; col. 7, ln. 1-2, 7-9; Figures 10-11.

The prosecution history for the ‘117 and ‘842 patents, and all related applications and reexamination proceedings.

Webster’s Unabridged Dictionary at 452 (Random House, 2001) (**Corner**: “the place at which two converging lines or surfaces meet”).

Defendant's Proposed Construction: The place where distinct converging walls meet.

Citations: '117 patent at col. 6, ll. 40-41, 58-65; Figs. 10-11; claims 1-36. '842 patent at col. 6, ll. 45-47; col. 6, ln. 64-col. 7, ln. 12; Figs. 10-11; claims 1-15.

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

B. CENTRAL AXIS

Plaintiff's Proposed Construction: an axis located equidistant from the four side walls and equidistant from corners formed by the four side walls.

Citations: '117 patent at col. 2, ln. 54-60; col. 6, ln. 58 – col. 7, ln. 7; col. 7, ln. 22-30; Figures 10-12; claims 1-36.

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

Defendant's Proposed Construction: An axis located at the center.

Citations: '117 patent at col. 2, ll. 57-60; col. 6, ll. 58-60, 65-67; col. 7, ll. 22-24; Fig. 11; claims 1-36. '842 patent at col. 2, ll. 58-60; col. 6, ln. 64-col. 7, ln. 7; Fig. 11; claims 1-15.

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

C. APPROXIMATELY

Plaintiff's Proposed Construction: nearly or approaching

Citations: *Webster's Unabridged Dictionary* at 104 (Random House, 1996) (**approximate:** "near or approaching a certain state, condition, goal, or standard.")

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

Defendant's Proposed Construction: Nearly exactly.

Citations: '117 patent at col. 6, ln 65-col. 7, ln. 2; claims 1-36. '842 patent at col. 6, ln. 67-col.7, ln. 4; claims 1-15.

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

Webster's Unabridged Dictionary at 104 (Random House, 1996) (*approximate*: "nearly exact; not perfectly accurate or correct.").

D. A HANDLE SECURED TO THE BLENDING JAR [AT/ADJACENT TO] THE [TRUNCATED FIFTH WALL/FIFTH TRUNCATED WALL/PLANAR FIFTH TRUNCATED WALL]

Plaintiff's Proposed Construction: A handle secured to the blending jar [at/adjacent to] the [truncated fifth wall/fifth truncated wall/planar fifth truncated wall].

Citations: '117 patent at col. 6, ln. 40-54; Figure 10; claims 1, 19 and 36.

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

Webster's Unabridged Dictionary at 2030 (Random House, 2001) (*at*: "(used to indicate a point or place occupied in space); in, on, or near").

Defendant's Proposed Construction: A handle that is secured to the fifth [planar] truncated wall.

Citations: '117 patent abstract; col. 6, ll. 40-41; 52-54; Figs. 10, 13; claims 1-36. '842 patent at col. 6, ll. 45-46; 58-60; Figs. 10, 13; claims 1-15.

The prosecution history for the '117 and '842 patents, and all related applications and reexamination proceedings.

IV. MARKMAN HEARING

The parties anticipate needing no more than one day to adequately present and argue the identified claim construction issues in a *Markman* hearing.

A. WITNESSES

The parties do not anticipate the need to call any witnesses or present any extrinsic affidavit testimony at the *Markman* hearing.

B. OTHER ISSUES

The parties do not anticipate the need for a prehearing conference prior to the *Markman* hearing.

Dated this 19th day of August, 2009.

Respectfully submitted,

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(*signed with permission by filing attorney*)

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